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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re T.G. Lee Foods, Inc.

Serial No. 76404232

Ava K. Doppelt of Allen Dyer Doppelt Milbrath & Gilchrist, P.A. for T.G. Lee Foods, Inc.

Tracy Whittaker-Brown, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Hairston, Bucher and Rogers, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

T.G. Lee Foods, Inc., seeks registration on the Principal Register of the mark FLAVOR FRESH BOTTLE! for goods identified in the application, as amended, as follows:

> "Milk and dairy based liquids, namely, flavored milk, cream, whipping cream, half and half, coffee creamer, buttermilk, all sold in bottles," in International Class 29.[1]

[1] Application Serial No. 76404232 was filed on May 6, 2002 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b).

This case is now before the Board on appeal from the final refusals of the Trademark Examining Attorney to register this designation based upon the grounds that:

(i) the applied-for term is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), because, when considered in relation to the identified goods, it describes a feature of applicant's goods; and

(ii) this phrase so resembles the following three marks registered in the United States Patent and Trademark Office (and owned by three different registrants, according to the records of the United States Patent and Trademark Office)[2] as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d):

REGISTRATION NO. 2293167 FLAVOR FRESH POUR SPOUT

for "fitment applicators, namely, plastic screw top caps sold as a component of cardboard containers," in International Class 20;

and

for "non-dairy creamer and egg products, namely, egg substitutes," in International Class 29;[3]

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[2] At the time of the final Office action, the Trademark Examining Attorney withdrew a fourth citation, to Registration No. 2468424 of the mark FLAVORTIGHT BOTTLE for "milk sold in opaque light resistant packaging," in International Class 29; and no claim is made as to the word BOTTLE apart from the mark as shown.

[3] Registration No. 2293167 issued to Morningstar Foods Inc., on November 16, 1999, reciting dates of first use and first use in commerce at least as early as March 1997. No claim is made as

REGISTRATION NO. 1386034 FLAVOR FRESH
for "coffee servers" in International Class 21;[4]

REGISTRATION NO. 0798247 FLAVOR FRESH
for "margarine" in International Class 29;[5] and

Applicant and the Trademark Examining Attorney submitted briefs. Applicant did not request an oral hearing.

Merely descriptive under Section 2(e)(1) of the Act

We turn first to the descriptiveness refusal. A term is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act if it immediately conveys information of significant ingredients, qualities, characteristics, features, functions, purposes or uses of the goods or services with which it is used or is intended to be used. A term is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if

to the words POUR SPOUT for the goods in International Class 20, apart from the mark as shown, and no claim is made as to the words FLAVOR FRESH for the goods in International Class 29, apart from the mark as shown.

[4] Registration No. 1386034 issued on March 11, 1986, reciting dates of first use and first use in commerce at least as early as April 26, 1985; now owned by Kraft General Foods, Inc.; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

[5] Registration No. 0798247 issued to Drew Chemical Corporation on the Supplemental Register on October 26, 1965, reciting dates of first use and first use in commerce at least as early as May 21, 1951; now owned by PVO Foods, Inc.; renewed.

imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. *See In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

The question of whether a particular term is merely descriptive is not decided in the abstract. Rather, the proper test in determining whether a term is merely descriptive is to consider the term in relation to the goods or services for which registration is sought, the context in which the term is used or is intended to be used, and the significance that the term is likely to have on the average purchaser encountering the goods or services in the marketplace. *See In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); *In re Intelligent Instrumentation Inc.,* 40 USPQ2d 1792 (TTAB 1996); *In re Consolidated Cigar Co.*, 35 USPQ2d 1290 (TTAB 1995); *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); and *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979).

Applicant argues that even if one were to conclude that each one of the three words that comprise this mark is individually merely descriptive of applicant's goods, the unique combination is suggestive of the goods.

However, we agree with the Trademark Examining Attorney that the matter that applicant seeks to register immediately conveys knowledge of a significant feature of the goods for which this designation is used. The laudatory nature of the words "Flavor Fresh" as applied to applicant's goods is evident.[6] The identification of goods reveals that the goods are "sold in *bottles*." In the context of applicant's identified goods, there is nothing indefinite, unexpected or incongruous about the combination of these three words, and no amount of thought or imagination is necessary to determine the attribute of applicant's products to which the phrase refers, i.e., that applicant's milk and other dairy-based liquids are sold in a "bottle" that maintains the "fresh flavor."

Likelihood of Confusion under Section 2(d) of the Act

We turn next to the issue of likelihood of confusion. Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing upon the issue of likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d

[6] Consistent with this result, we note that the registrant in Registration No. 2293167 disclaimed the words FLAVOR FRESH for its creamer and egg substitutes, and that FLAVOR FRESH for margarine in Registration No. 0798247 issued on the Supplemental Register.

1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

(1) Registration No. 2293167 – FLAVOR FRESH POUR SPOUT for plastic screw top caps, creamer and egg substitutes

The Trademark Examining Attorney has demonstrated by way of third-party registrations that several manufacturers have registered the same trademark for the goods including those of applicant (e.g., milk, whipping cream, etc.) and of Morningstar Foods Inc. (e.g., non-dairy creamer, egg substitutes). While such registrations are admittedly not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein are of the kinds which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6. Accordingly, we find the goods in this cited registration and applicant's goods to be related.

The marks are FLAVOR FRESH POUR SPOUT and FLAVOR FRESH BOTTLE! The similarities of these five-syllable terms as to sound and appearance are fairly obvious on their face. The Trademark Examining Attorney also argues that inasmuch as applicant's goods are all sold in "bottles," the first and most dominant portion of applicant's composite mark is FLAVOR FRESH. As noted above, although each of the terms in applicant's mark is merely descriptive, we find that the first words in composite marks are often the most dominant portions of the marks.[7] Hence, in applicant's designation, arguably the term "Flavor Fresh" dominate over the word "Bottle." Furthermore, when applicant's designation and this cited mark are compared in their entireties, there is a clear parallel construction between FLAVOR FRESH BOTTLE! and FLAVOR FRESH POUR SPOUT. In the context of the involved liquids, we find that the terms "pour spout" and "bottle" would both be perceived as indicating the nature of the respective containers. While bottles and cardboard

[7] Even though registrant has disclaimed the words "Flavor Fresh" as applied to its creamer and egg substitutes, for purposes of our analysis under Section 2(d) of the Act, merely descriptive matter must still be given some consideration when comparing the marks in their entireties. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) [THE CASH MANAGEMENT EXCHANGE (with the words CASH MANAGEMENT disclaimed) for computerized cash management services held likely to be confused with CASH MANAGEMENT ACCOUNT for various financial services].

containers having pour spouts inserted therein are different, consumers would perceive these designations as variations on a theme, indicating that both containers, albeit different, contain fresh, flavorful products. In short, when this application is compared with Registration No. 2293167, we find closely-related goods to be sold under marks having quite similar overall commercial impressions.

(2) Registration No. 1386034 – FLAVOR FRESH for coffee servers

The Trademark Examining Attorney argues that applicant's goods (e.g., milk, cream, half and half, and coffee creamer) would often be placed next to the coffee pot or carafe like those of Kraft General Foods, Inc. The marks are FLAVOR FRESH and FLAVOR FRESH BOTTLE!

We agree with the Trademark Examining Attorney that FLAVOR FRESH for a coffee server or carafe creates the same commercial impression as FLAVOR FRESH BOTTLE! for the milk and coffee creamer served from a bottle. Both of these designations will convey to prospective purchasers that the containers maintain freshness and flavor for the liquids dispensed therefrom. However, we acknowledge that FLAVOR FRESH is a highly suggestive mark in this context and is entitled to a relatively narrow scope of protection.

Although personal experience tells us that coffee whiteners might well be placed next to a coffee carafe, we find no evidence in the record that these products are routinely sold under the same mark; we find no convincing evidence that prospective consumers would expect that applicant's dairy products and the cited goods, e.g., coffee servers, emanate from the same source; and the arguments as to food products being inexpensive, impulse items would not seem to apply as clearly to coffee servers. Accordingly, we reverse the refusal to register as to this cited registration.

(3) Registration No. 0798247 – FLAVOR FRESH for margarine

As in the previous registration, applicant has adopted PVO Foods, Inc.'s entire mark as the first and most dominant portion of its own composite mark. While this cited registration is on the Supplemental Register, it is nonetheless entitled to protection against a substantially similar mark for closely-related goods. *See In re The Clorox Company*, 576 F.2d 305, 198 USPQ 337 (CCPA 1978) [ERASE for "laundry soil and stain remover" is likely to cause confusion with STAIN ERASER, registered on the Supplemental Register, for "stain removers"]. The Trademark Examining Attorney has demonstrated by way of

third-party registrations that several manufacturers have registered the same trademark for applicant's listed goods (e.g., milk, cream, etc.) and for margarine, the product sold by PVO Foods, Inc. *See In re Albert Trostel, supra*.

As to the two above-discussed registrations for food products, we note the significance of the *du Pont* factor focusing on the conditions under which and buyers to whom sales of these respective products will be made. The goods in question are relatively inexpensive dairy products and related food items. Because such inexpensive products are subject to impulse purchasing decisions, potential consumers are held to a lesser standard of purchasing care, in turn increasing the likelihood of confusion as to the source of the goods. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984). Applicant argues in a conclusory fashion, without any offer of proof, that these products are not subject to impulse purchasing inasmuch as consumers "pay attention to food products, and exercise care in those purchases." In this vein, applicant concludes that food consumers are "well-versed," "sophisticated," "knowledgeable" and "discriminating."

Applicant's appeal brief, p. 9. Absent some compelling evidence on this point, we find unpersuasive the argument that we should therefore find no likelihood of confusion between applicant's designation and those in the two cited registrations that cover food products.

As to the *du Pont* factor focusing on the number and nature of similar marks in use on related goods, applicant correctly points out that these cited marks must be viewed as relatively weak inasmuch as (i) none of the cited marks consist of coined or arbitrary words; (ii) one includes disclaimers and another is a registration on the Supplemental Register; and (iii) each of the cited registrations contain the words "Flavor Fresh" but they are owned by three different, seemingly unrelated entities. As a result, applicant argues that such weak marks are entitled to only a *low level* of trademark protection, i.e., generally limited to the specific goods listed in the registration, citing to *In re Hunke & Jocheim*, 185 USPQ 188 (TTAB 1975) [no likelihood of confusion between DURABUL registered for record books and applicant's mark HIG•DURABLE (with "Durable" disclaimed) as a trademark for

stationery articles such as file folders and binders, writing pads, papers, etc.].[8]

Notwithstanding any alleged weaknesses in the cited marks, as noted above in our discussion of the cited registration on the Supplemental Register, even weak marks are entitled to protection against registration by a subsequent user of the same or a substantially similar mark for the same or closely-related goods or services. *See* *Hollister Incorporated v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976) [Likelihood of confusion between IDENT-A-PET for tattooing of pets for identification and IDENT-A-BAND for cards inserted into bands bearing identification].

In conclusion, we find that applicant's mark creates the same or a very similar overall commercial impression as do the marks of the cited registrations, that applicant's goods must be considered to be closely related to two of the cited registrants' identified goods, and that generally potential consumers for the cited dairy and related food items as well as for applicant's dairy items will be making impulse purchasing decisions from among inexpensive goods. Accordingly, we find that applicant's mark, when used in

[8] It is not clear to us from the Board's *Hunke & Jocheim* reversal exactly what impact the differences in spelling between DURABUL and DURABLE may have played in the outcome of that decision. There is no such variation in spelling involved in the instant case.

connection with the identified goods, so resembles the registrants' marks in Registration Nos. 2293167 and 0798247 as to be likely to cause confusion, to cause mistake or to deceive, and we affirm as to these two cited registrations. On the other hand, we reverse the refusal as to Registration No. 1386034.

Decision: Although we reverse the refusal under Section 2(d) of the Act as to Registration No. 1386034, the refusals to register this mark (i) based upon Section 2(e)(1), and (ii) based upon two of the three registrations cited under Section 2(d) of the Lanham Act (Registration Nos. 2293167 and 0798247), are hereby affirmed.